SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 30 1968
DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

**No. 478**

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL.,

*Petitioners,*

*vs.*

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

## BRIEF OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., AMICUS CURIAE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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### INTEREST OF AMICUS.

The International Council of Shopping Centers, Inc. is a not-for-profit corporation. Its membership of 2400 consists of entities and individuals involved in construction, acquisition, leasing and management of shopping centers. There are approximately 10,500 to 11,000 shopping centers in operation in North America. They account for approxi-

mately one-third of all retail sales, exclusive of the sale of automobiles and building materials. It is the only trade association representing the shopping center industry in the United States.

The Council's interest is obvious from the nature of the far-reaching contentions advanced to the Court:

1. By petitioners, that union pickets' rights of free speech should be extended so as to permit picketing on private property, specifically the parking lots and loading zones of the shopping center involved here, no showing having been made that respondents ever permitted any other non-shopping center use of the property;

2. By the *amicus* brief of the American Civil Liberties Union, which suggests that similar rights should be extended not only to union pickets, but also to other demonstrators who *believe shopping center property provides* a more "effective" site for their activities than public property (p. 8).

Either contention, if accepted, would result in expropriation of private property, the access to which has heretofore been limited to those in either actual or potential business relations with the owner or tenants of the shopping center. The matter is of considerable importance to shopping center owners and tenants as their income is dependent upon the untrammeled availability, and ease of customer access to, parking space.

The written consents of counsel for petitioners and respondents have been filed with the Clerk of this Court.

## ARGUMENT.

While petitioners' arguments in favor of permitting pickets to invade private property are couched in the evocative and ringing rhetoric of civil liberties, the sole asserted justification for this novel proposition is that it would make such picketing more "effective" (p. 24). We will show:

(1) This Court has never accepted "effectiveness" as a justification for the right to demand access even to public property where the asserted right of free speech would conflict with the limited use to which the property has been put.

(2) The only decisions of this Court which have recognized a right of access to private property as a necessary adjunct of free speech have involved company towns, logging camps or other areas from which the inhabitants emerge only rarely and irregularly, and those decisions have sought to protect such inhabitants from censorship.

(3) A decision holding that the right of free speech embraces a right of access to the speaker's favored forum on others' property would wreak havoc with shopping centers and with all attempts by owners, public or private, legitimately to select the use to which their property is to be put. As to shopping centers, it would constitute an unlawful, uncompensated, expropriation of private property for the private use of others.

1. This Court recently rejected the proposition that the right of free speech carries with it the right to picket or demonstrate everywhere on publicly owned property. In *Adderley* v. *Florida*, 385 U. S. 39 (1966), petitioners were students who had been convicted of trespass for demonstrating on the premises of a county jail protesting

against some of their schoolmates' arrests in civil rights demonstrations. This Court scotched the notion that a speaker has a constitutional right to demand access to any site felt by him to be "particularly appropriate":

> "*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also *particularly appropriate.* . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases Petitioners rely on, *Cox* v. *Louisiana, supra,* at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." (pp. 47-48, emphasis added.)

Four members of the Court dissented on the ground that the demonstration was a petition for the redress of grievances and that the jailhouse was a "seat of government" and therefore appropriate for such a protest (p. 49). However, the dissent recognized that "to say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government not to private proprietors" (p. 52).

Even as to publicly owned property the dissent recognized no right of unlimited access:

> "A noisy meeting may be out of keeping with the serenity of the state house or the quiet of the court-

house. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally." (p. 54.)

The Court has expressed similar views as to the rights of groups holding public meetings on private property to exclude persons desiring to speak from such forums. In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), which involved the constitutionality of a municipal ordinance forbidding the use or operation of sound trucks on public streets, the Court observed:

> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism."
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> "While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign *'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. Martin* v. *Struthers*, 319 U. S. 141, 143, 148." (pp. 86-87; emphasis added.)

2. The only cases in which this Court has held that the right of free speech carried with it a right of access to private property have involved company towns, logging camps or other areas where the right of a community of citizens has been involved. Thus, in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the Court in a divided opinion reversed a conviction for trespass stemming from Marsh's distribution of religious literature on the sidewalks of a company-owned town. The essential reasoning was:

> "[T]he circumstance that the property rights to the premises where the deprivation of liberty, here in-

> volved, took place, were held by others than the public, is not sufficient to justify the State's permitting a *corporation to govern a community of citizens so as to restrict their fundamental liberties* and the enforcement of such restraint by the application of a state statute." (p. 509; emphasis added.)

The Court reasoned:

> "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. *To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.* There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (pp. 508-509; emphasis added.)

Justice Frankfurter filed a concurring opinion stating "[t]hese community aspects are decisive in adjusting the relations now before us . . ." (pp. 510-511).

*Marsh* v. *Alabama* was, of course, the precursor of other decisions recognizing the right of access to company-owned towns or other isolated communities of citizens: *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226 (1946) (company town); *NLRB* v. *Lake Superior Corp.*, 167 F. 2d 147 (C. A. 6, 1948) (company-owned logging camp); *NLRB* v. *City Service Oil Co.*, 122 F. 2d 149 (C. A. 2, 1941) (ship's crew). That the community aspects of these cases were decisive was re-emphasized again in *Evans* v. *Newton*, 382 U. S. 286 (1966) both by the majority and dissent.

The instant case does not involve a company town or a community of any variety. No one lives in the shopping center. There are no citizens whose right to know need be

protected from censorship; no inhabitants whose rights to speak may be inhibited.

It is therefore apparent that the petitioners can find no comfort in the prior decisions of this Court, but rather are asking it to manufacture new constitutional doctrine out of thin air. Certainly a plain reading of the First and Fourteenth Amendments can support no such invasion of the landowner's right to control his property and use it as he sees fit.

3. A few practical observations should be made.

Shopping centers are a response to the needs and demands of customers, the principal two of which are: (1) their need and desire for adequate parking space immediately adjacent to where they intend to make their purchases; and (2) the desire of the consumer for one-stop shopping. Neither in this case nor in general is there the slightest bit of evidence that shopping centers are designed to insulate tenants from labor unions.

The gross sales of a shopping center are so dependent upon available parking space, and land for parking is so expensive, that this *amicus* has subsidized studies by the Urban Land Institute which have concluded, that there is an optimum ratio of parking spaces to the gross leasable area of the shopping center. (Aronov, Aaron in Chain Store Age Sp. Ed. E. 41, May, 1967.) The shopping center also bears the heavy costs of taxation and maintenance of the parking lot and other common areas. It follows therefore that, as a matter of economic self-defense, shopping center owners and tenants typically prohibit non-business use of their parking facilities, one of their most valuable assets, and mutually covenant that the parking lots and other common areas will be used solely for the purposes for which designed.

The steps which shopping center owners take to limit

the use of their property to customers vary, but among the more common are: posting signs informing the public that the shopping center is private property "for use by customers only"; placing chains across entrances during non-business hours; towing away cars parked there by non-customers; restricting employee parking to designated areas; prohibiting the placing of advertising material on cars parked in the center; and otherwise policing the area.

At the time of the issuance of the injunction in this case the shopping center was only partially open, only two tenants having their business in operation (R. 88). (Petitioners assert that there are now fifteen additional businesses there (p. 3, fnt. 1).) Nevertheless, even though the shopping center was new, what little evidence there is in the record will not support petitioners' extravagant claim that, "*unlike other members of the public,* the picket with a labor message has not been invited to enter."

There is no evidence in the record that the Logan Valley Plaza was opened to the public except for persons who were customers, or potential customers, or had other business relationships with either the owner or tenants. There is no evidence that it had ever permitted its parking lot, or that Weis had permitted its parcel pick-up zone, to be used for other purposes. The only evidence is to the contrary—the Weis manager asked the manager of a competitive store who had blocked the pick-up zone with his car to move it and he did so (R. 30-31).

The effects of the picketing demonstrate precisely why the shopping center owner and tenant necessarily attempt to exclude non-customers of whatever persuasion from their property. The pickets marched two, three and four abreast (R. 32, 47) in the vicinity of the parcel pick-up zone (R. 29) "right where the cars will drive in for the groceries" (R. 47). The picketing "hindered the cars from driving in" (R. 47), "causing congestion" (R. 30) in the

pick-up zone, resulted in a "milling around" (R. 30) of customers among the moving cars, required "navigating by customers in and out" (R. 44) and endangered the pickets (R. 44) and undoubtedly customers as well.

It is obvious that petitioners' conduct was wholly in conflict with the legitimate business purposes for which the parcel pick-up zone was intended.

4. Viewed more broadly, it is obvious that petitioners' essential argument is an attack on the fundamental right of an owner to determine and control the use to which his property is to be put and to exclude other persons from it where they endeavor to use it for purposes that conflict with the intended use. These rights to determine use and to prevent other use are essential attributes of the value of property to the owner. Moreover, the argument that the right of free speech carries with it the right of access to the speakers' most favored forum, and that those rights are superior to the rights of ownership, is a limitless doctrine leading to the grossest of absurdities. At the risk of belaboring the obvious, we suggest that the right of free speech does not justify intrusion into the quiet of the reading room of a public library, nor does it afford the Lutheran a right to "demand equal time" in a Catholic church. *A fortiori*, in the private sector no rule of law or reason requires a shopping center owner to permit his parking lots and sidewalks to become a cockpit for contending factions, assorted demonstrators, or business competitors. Any such result would clearly run afoul of the Fifth Amendment and amount to nothing more than the expropriation of private property for what petitioners conceive to be public purposes. If the need for unlimited access to parking lots of shopping centers be so vital to the public as petitioners contend, we suggest that the constitutional method of satisfying that (we say non-existent) need would be condemnation of the parking lots by the

appropriate state authority with fair compensation to the owner, removal of the property from the tax rolls, and assumption by the public of the burdens of maintaining it and providing police protection. If the public interest in the matter be as substantial as petitioners contend, the public is not without tools to protect it in a constitutional fashion.

## CONCLUSION.

The decision of the Court below should be sustained.

Respectfully submitted,

FRED H. DAUGHERTY,
*Attorney for International Council of Shopping Centers, Inc.*

January 26, 1968.